IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 405 OF 2004

Pontry Malik Construction Company .. Petitioner

Versus

Hindustan Petroleum

Corporation Ltd., .. Respondent

Mr. Rajeev Kumar i/by M/s. Vyas & Bhalwal

for petitioner.

Mr. M.D. Siodia i/by Rustomji & Ginwala

for Respondents.

CORAM : S.U. KAMDAR, J.

DATE : 15TH DECEMBER, 2004

P.C.

1. The present petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the award passed by the Arbitrator dated 27.4.2004.

2. Some of the material facts which are relevant for the purpose of the present petition are briefly enumerated as under :-

3. On 27.9.1994 the respondent company invited tenders for the construction of roads, drain, culverts, etc at their LPG import facilities at Mangalore. On 27.9.1994, a letter of intent was issued and on 21.11.1994 the tender of the petitioner was accepted. The said tender terms stipulated date of completion of the contract as 26.7.1995. The contract was not completed within stipulated date of completion. However, it seems that there were serious disputes between the petitioner and the respondent company and accordingly, the respondent company terminated the contract sometime in or about February, 1996. The petitioner, therefore, raised claims and on 20.2.1994 requested the respondent company for appointment of a Arbitrator in accordance with the arbitration clause contained in the tender document. On 9.4.1997, the respondent company appointed S. Roy Chaudhury as the Sole Arbitrator. On 5.6.1997 the learned arbitrator entered upon the reference. After hearing both the parties and substantial evidence being recorded, the arbitrator has passed the impugned award on 27.4.2004 rejecting the claims of the petitioner and holding that the petitioner is liable to make payment of the damages to the respondent company. Thus, an award is passed against the petitioner in the sum of Rs. 35,71,788/- with interest thereon at the rate of 7%

per annum and if payment is not made within 90 days of the receipt of the award then the interest thereafter to be paid by the petitioner to the respondent company at the rate of 9% per annum.

4. The learned counsel appearing for the petitioner has challenged the said award on three grounds. The first contention raised by the learned counsel for the petitioner is that the award in so far as the liquidated damages is concerned, is wholly unsustainable and contrary to the Apex Court decision in the case of Hind Construction Contractors by its sole proprietor Bhikamchand Mulchand Jain (dead) by LRs vs. State of Maharashtra, reported in (1979) 2 SCC 70, As a second ground of challenge it has been contended by the learned counsel for the petitioner that the award is liable to be set aside because the arbitrator has not accepted the final bill prepared by the petitioner on the ground that the said bill prepared by the petitioner on the basis of their own measurement can not be accepted. The learned counsel for the petitioner has contended that the award of the arbitrator is contrary to the terms of the contract and thus the same is liable to be set aside. The third and the last contention advanced by the learned counsel for the petitioner is that in so far as the claim for damages is concerned which has been awarded by the arbitrator the respondents

have neither entered into the witness box and proved the claim for damages nor produced any documentary evidence to establish such claim for damages. It is, therefore, contended by the learned counsel for the petitioner that the award of the arbitrator is bad in law and is liable to be quashed and set aside.

5. On the other hand, the respondent corporation has submitted that the award of the arbitrator is legal, valid and justified. He has contended that the finding of the arbitrator is essentially on the issue of facts and this Court ought not to interfere with the same under Section 34 of the Arbitration and Conciliation Act, 1996. The learned counsel for the respondent further submitted that there is no breach of any terms and conditions of the contract by the arbitrator. On the contrary the award passed by the arbitrator is in consonance with the said terms and conditions of the contract and, therefore, the same cannot be disturbed and/or set aside. He further contended that under section 34 of the Arbitration and Conciliation Act, 1996, the jurisdiction of the Court to scrutinise an award being very limited, this Court ought not to interfere with the said award and the same should be upheld by the Court.

6. I have heard the rival contentions of the

parties and I am of the opinion that the present petition has no merit. In so far as the first contention of the learned counsel for the petitioner is concerned, I find that the said contention is based on the total erroneous footing. The reliance placed on the judgment of the Apex Court in M/s. Hind Construction Contractors (supra) do not apply to the facts and circumstances of the present case. The learned counsel for the petitioner has contended that there was a clause for extension of time under the contract between the parties and once there is a provision for extension of time then, irrespective of the fact whether the respondent company has extended the time or not, the said liquidated damages cannot be imposed. I am afraid to accept the said proposition of law so far as liquidated damages are concerned. The question of delay in execution of the contract can be waived either by granting extension of time or by accepting the completion of work even at the delayed stage. In the present case, neither there is any extension of time granted by the respondent company nor the petitioner has completed the said work. The learned counsel for the petitioner has taken me though the various minutes of the meetings as well as the letters forming part of the compilation which are filed by the petitioner. I have perused the said documents on record. In none of the said letters I can find that there is in fact an extension of time

granted by the respondent company though of course the petitioner has requested from time to time for such an extension. In view of the fact that there was no extension granted at all by the respondent company, no question of waiver of delay on the part of the respondent company arises. Apart therefrom, in the present case, admittedly the work is not completed. The work has been stopped and the contract has been terminated by the termination notice dated 16.2.1996. In view thereof, once again the question of accepting the delay and/or extension of time does not arise.

7. The learned counsel for the petitioner has brought to my notice clause 5(d) of the contract inter alia prescribing for extension of time and by relying upon the said clause 5 (d) it has been purportedly contended that the respondent company is not liable to levy of any liquidated damages. However, the learned counsel for the respondent company has pointed out that the contract has been terminated in exercise of clause 12 because of unreasonable delay in completion of work and the said clause 12 inter alia empowers the respondent company to recover the actual loss suffered by carrying out the work at the risk of the petitioner from third parties. In light of the rival submissions, I am of the opinion that the finding of the arbitrator that the petitioner is liable to make

payment of the damages in the liquidated sum due to considerable delay nd non-completion of work even after expiry of stipulated date for completion of work i.e. 25.7.1995 cannot be disturbed in jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996. Reliance placed by the learned counsel for the petitioner on the judgment of the Apex court in the case of M/s. Hind Construction Contractors (supra) is misconceived. It is because in that judgment there was an implied waiver of delay by granting extension of time and on completion of the work the same was accepted by the Government of India. No such situation exists in the present case. In view thereof, I am of the opinion, that the reliance placed by the learned counsel for the petitioner on the judgment of the apex Court in the case of M/s. Hind Construction Contractors (supra) is misconceived. In the circumstances, aforesaid, I reject the contention of the learned counsel for the petitioner that the arbitrator was not empowered to allow the claim for liquidated damages in accordance with the terms and conditions of the contract.

Furthermore, the arbitrator has relied upon clause 12.1 of the contract. The same provides as under:

"12.1 The owner may terminate the contract

at any stage of the construction for reasons to be recorded in the letter of termination."

Under clause 12.4 of the contract the respondent Corporation is entitled to carry out the uncompleted portion of work by themselves through thrid party at the risk of the petitioner. The said clause 12.4 reads as under :

"12.4. The owner shall have the right to carry out the unexecuted portion of work either by themselves or through other agencies at the cost of the contractor."

Thus on a true and proper interpretation of the contract not only the respondent company is entitled to terminate the contract and levy the claim for damages. But the reliance placed on clause 5 (d) of the contract has no application whatsoever. The penalty in the form of liquidated damages has been prescribed under clause 10 being maximum of 5% of total contract value. Thus, the award passed by the arbitrator is in consonance with the terms of the contract and based on the material available before him. It is not possible to interfere with such an award in jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996.

8. This takes me to the next contention whether the arbitrator was justified in rejecting the final bill forwarded by the petitioner. Before we go to the next contention, it is necessary that the relevant terms in respect of the said claim be set out. Clause 12.5 of the contract reads as under :-

> "12.5 The Contractor within or at the time fixed by the Owner shall depute his authorised representative for taking joint final measurements of the works executed thus far and submit the final bill for the work as per joint final measurement within 15 days of the date of joint final measurement. If the contractor fails to depute their representative for joint measurement, the owner shall take the measurement with their Engineer-in-Charge/Site-in-Charge or any other outside representatives. Such a measurement shall not be questioned by the Contractor for purpose of Arbitration."

Under the said clause 12.5 of the contract it is provided that in so ar as the final measurement is concerned, the same has to be carried out after notice is issued by the owner to the contractor jointly. In an event, the contractor does not join

for the said measurement then the measurement carried out by the Engineer-in-Charge /Site-in-Charge will be final and binding and such measurement shall not be questioned by the contractor and no dispute can be raised by the contractor for the purpose of abritration. It is, therefore, clear that by the terms and conditions of the contract the jurisdiction of the arbitrator is ousted in respect of measurement dispute. The measurement taken out by the respondent company in the absence of joint measurement because of non-presence of the petitioner's representative inspite of notice is made final and binding on parties as well as arbitrator. In light of the aforesaid facts, the arbitrator was right and justified in holding that the final bill prepared by the petitioner on the basis of the unilateral measurement carried out by them can be taken into consideration. The learned arbitrator has therefore rightly held that the dispute raised pertaining to the grievance of the measurement carried out by the respondent company cannot be entertained, as it has no jurisdiction to go into it by virtue of clause 12.5 of the said contract. In my view, the decision of the arbitrator to exclude the said dispute from his jurisdiction is as per the aforesaid terms and conditions of the contract and the arbitrator was justified and correct in not going into the issue in respect of the same. In light of the aforesaid

facts, I am of the opinion that the issue raised by the petitioner in respect of the said aspect of final measurement also do not have any merit whatsoever and the same is liable to be rejected.

9. This leads me to the third and the last contention raised by the learned counsel for the petitioner that in so far as the claim for damages is concerned, it has been raised by the respondent company in pursuance of clause 12.5 of the contract. The respondent company has not produced any material or evidence on record. It was also contended that no witnesses were produced and no oral evidence was led. The learned counsel for the respondent has taken me through the statement of claim which contained in vol. V of the said compilation. In para. 20 the large number of documents are referred to by the respondent company and they are filed before the arbitrator. These documents pertain to the contract entered into with the third party contractor, the payments made and various bills and vouchers pertaining thereto. It is undoubtedly true that the respondent company did not lead any oral evidence. However, in my opinion, it is not necessary to lead oral evidence for proving the aforesaid documents. Once the documents are produced and are not challenged, then, the claim of the respondent company of the amount spent for making payment to the third party for carrying out

incomplete work has been established. In that view of the matter, the arbitrator was right and justified in granting the said claim. In my opinion, the contention of the learned counsel for the petitioner that the said finding of the arbitrator is based on no material and/or no evidence is, therefore, factually incorrect. I am of the opinion that once a conclusion is arrived at as there was material and/or evidence before the arbitrator to arrive at such a conclusion then the appreciation of material or evidence on the basis of which such conclusion was arrived at is not within the jurisdiction of this Court under Section 34 of the Arbitration and Conciliation Act, 1996. In that view of the matter, the third contention raised by the learned counsel for the petitioner also fails and thus rejected.

10. In the aforesaid circumstances, the present arbitration petition is devoid of any merit and therefore, the same is dismissed. However, there shall be no order as to costs.